# No. 12,430

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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WILLIAM PATRICK BRANDHOVE,
*Appellant,*

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee); HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON; CLYDE A. WATSON and ELMER E. ROBINSON,
*Appellees.*

## BRIEF FOR APPELLEES OTHER THAN ELMER E. ROBINSON.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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### STATEMENT OF BASIS OF ORIGINAL AND APPELLATE JURISDICTION.

The present appeal is from a judgment of the District Court of the United States for the Northern District of California, Southern Division, dismissing appellant's complaint for damages as to each and all of the appellees. This Court has jurisdiction by 28 U.S.C.A. Sec. 1291.

The appellant asserts that his complaint was for damages under the Civil Rights Act (Rev. Stat. Sections 1979 and 1980, 8 U.S.C.A. Sections 43 and 47(3) of which the District Court had jurisdiction under 28 U.S.C.A. Section 1343 (1) and (3)). Appellees deny that the complaint stated a claim for relief under the Civil Rights Act.

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## STATEMENT OF THE CASE.

On March 21, 1949, appellant filed in the United States District Court for the Northern District of California, Southern Division, a complaint for damages against the appellees. Appellant's "Statement of the Case" is a paraphrased summary, essentially accurate, of a *portion* of his complaint.

The complaint, however, contains more. Paragraph 8 thereof makes the record of the hearing before the Senate Fact-Finding Committee on Un-American Activities, hereinafter referred to as the "Committee", an exhibit, and by reference it is made a part thereof (Exhibit F, T.R. 26-75). The complaint makes the subpoena served upon appellant a part of his complaint. See Complaint, Paragraph 3 (T.R. p. 5). The subpoena appears in the transcript on page 22. Thus, the complaint in its entirety alleges that a subpoena was served upon appellant on January 28, 1949, and pursuant thereto he appeared before the Committee in an open meeting at the State of California Capitol Building on Saturday, January 29, 1949, at which time

the Committee members were present; the Attorney General's office of the State of California was present, represented by J. Francis O'Shea, Assistant Attorney General of the State of California; Angus Morrison, Esq., Assistant Legislative Counsel of the California State Legislature was present; other attaches of the Committee were present; and Martin A. Jarvis, Esq. was present, appearing on behalf of appellant.

Proceedings were thereupon had, and the chairman of the Committee called the appellant to the stand as a witness. He was thereupon sworn and gave his name and address and occupation. He was asked this question:

"Where did you reside in 1946, in December?"

Thereupon, appellant declared he was represented by Mr. Martin Jarvis of San Francisco. He was asked the question of whether he wished to confer with Mr. Jarvis. Thereupon, Mr. Jarvis, before any further questions were asked of the witness, engaged in a discussion with the chairman of the Committee, in the course of which he presented to and made a part of the record a sworn copy of the statement (Protest to the Legislature) which is part of the complaint of appellant, marked "Exhibit B", and which appears in the transcript on pages 18 to 22, and then stated the objections of William P. Brandhove to answering questions before the Committee at the hearing. The objections all appear in the transcript, pages 30, 31 and 32. The objections, all made before the hearing developed, were, briefly, that the purpose of the ques-

tions had not been disclosed to Mr. Brandhove; that questions on the subject of the protest against the Senate Un-American Activities Committee were not for a legislative purpose and were in excess of the jurisdiction of the Committee; that the Committee cannot act as judge and accused (accuser). The objections are coupled with charges and demands made upon the Committee by the counsel for Mr. Brandhove, all of which appear in the transcript. The objections were overruled by the chairman. Mr. Jarvis thereupon instructed the witness not to answer any further questions on the grounds stated by him. The chairman overruled the objections again and stated that the witness would be directed to answer the questions. Thereupon the pending question was repeated:

> "Mr. Brandhove, where were you residing in December, 1949?" (sic, 1946).

The witness refused to answer on advice of counsel. The witness was thereupon asked this question and gave this reply:

> "Q. Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?
>
> A. On advice of Counsel, I will not, no, sir."

The chairman asked what was the feeling of the Committee, and Senator Dilworth indicated that he felt that the witness was in contempt and that the proper method of dealing with the matter was in the Courts. The Attorney General's office was asked for advice. Discussion was had between the Committee

and the representative of the Attorney General's office and Mr. Morrison, Assistant Legislative Counsel for the State of California. Sections 9410 and 9412 of the Government Code of the State of California were read into the record. Further discussion was had and thereupon the following questions were asked and the following answers given:

"Q. Were you employed by the United States Army Transport Service as Chief Steward at any time?

A. I refuse to answer on advice of counsel.

Q. Were you living at 1831 Twenty-first Avenue in the City of San Francisco in December of 1946?

A. I refuse to answer upon the advice of counsel.

Q. Your objections here, Mr. Brandhove, are based on the grounds your counsel has propounded to the Committee?

A. Yes, sir.

Q. And that is going to be the grounds, on which you object to answering every question?

A. I refuse to answer on advice of counsel."

Continued discussion occurred between counsel for Brandhove and the Committee. Thereupon the following proceedings occurred:

"Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?

A. I refuse to answer any and all questions on advice of counsel.

Q. Do you know Mr. Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Are you acquainted with Harry Bridges?
A. I refuse to answer on advice of counsel.
Q. Are you acquainted with Louis Goldblat?
A. I refuse to answer on advice of counsel.
Q. Do you know David Jenkins?
A. I refuse to answer on advice of counsel.
Q. Are you acquainted with John Wiley?
A. I refuse to answer on advice of counsel.
Q. Are you acquainted with Oleta O'Connor Yates?
A. I refuse to answer on advice of counsel.
Q. Do you know Paul Schnur?
A. I refuse to answer on advice of counsel.
Q. Do you know Sestolv Ward?
A. I refuse to answer on advice of counsel.
Q. Do you know Dick Linden?
A. I refuse to answer on advice of counsel.
Q. Do you know David Hedley?
A. I refuse to answer on advice of counsel.
Q. Do you know Revels Clayton?
A. I refuse to answer on advice of counsel.
Q. Do you know Mr. Mervyn Rathborne?
A. I refuse to answer on advice of counsel.
Q. Do you know Mr. Walter Stack?
A. I refuse to answer on advice of counsel.
Q. Do you know Blacky Quadros?
A. I refuse to answer on advice of counsel.
Q. Do you know Molly K. Spolmack?
A. I refuse to answer on advice of counsel.
Q. Do you know Elaine Sexton?
A. I refuse to answer on advice of counsel.
Q. Do you know Mary Lake?
A. I refuse to answer on advice of counsel.
Q. Do you know Mr. R. E. Combs?
A. I refuse to answer on advice of counsel.

Q. Do you know Hugh Bryson?

A. I refuse to answer on advice of counsel.

Q. Do you know Nathan Jacobsen?

A. I refuse to answer on advice of counsel.

Q. Do you know Irving Dvorin?

A. I refuse to answer on advice of counsel.

Q. Do you know Scotty Sneddon?

A. I refuse to answer on advice of counsel.

Q. Do you know Joseph Harris?

A. I refuse to answer on advice of counsel.

Q. Do you know James Kiernan?

A. I refuse to answer on advice of counsel.

Q. Do you know Frank Havenner?

A. I refuse to answer on advice of counsel.

Q. Calling your attention to February of 1945, did you discuss affiliation with the Communist Party with anyone?

A. I refuse to answer on advice of counsel.

Q. In February of 1945, did two men by the name of McCormick and Bryson agree to recommend you to membership in the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Were you invited to a dinner by Frank McCormick at the home of Henry Fisher in San Francisco?

A. I refuse to answer on advice of counsel.

Q. Did you attend a dinner in San Francisco on or about February 1945 at which time was present Richard Gladstein, Walter Stack, Mrs. Stack and Mrs. Gladstein and Frank McCormick?

A. I refuse to answer on advice of counsel.

Q. Have you ever been, Mr. Brandhove, a member of the Communist Party?

A. I refuse to answer on advice of counsel.

Q. Are you now a member of the Communist Party, Mr. Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis. Mr. Chairman, we have some more signed copies of the objections.

Chairman Tenney. We would be glad to have them.

Q. Referring to the affidavit that your counsel has presented to the Committee, is that your signature, William Patrick Brandhove?

A. I refuse to answer on advice of counsel.

Mr. Jarvis. In that regard, Mr. Chairman, the signature is before a Notary and the fact that the Notary is a Notary is a matter for judicial recognition.

Chairman Tenney. Is that your signature, William P. Brandhove?

Q. Did you take this affidavit before a Notary and have it notarized?

A. Yes, I did.

Q. And that was on the twenty-ninth of January, 1949?

A. This morning.

Q. Did you sign the affidavit in the presence of the Notary?

A. Yes, I did, in his office.

Q. That is Mr. R. M. Stillane?

A. Yes, sir.

Q. Are you acquainted with Assemblyman George Collins?

A. I refuse to answer on advice of counsel.

Q. Were you a guest of Mr. Collins in the Assembly yesterday?

A. I refuse to answer on advice of counsel.

Q. Were you with Mr. Collins in the Assembly today?

A. I refuse to answer on advice of counsel.

Q. Are you a friend of William Snyderland, the secretary of the Communist Party in California?

A. I refuse to answer on advice of counsel."

Thereupon a motion was carried unanimously to the effect that the Committee hold the witness in contempt and that counsel be instructed to prepare the necessary complaint and have it filed against him in the proper Court in Sacramento.

Two other questions were asked of appellant and the following answers given:

"Q. Are you acquainted with Congressman Franck Havenner's secretary?

A. I refuse to answer on the advice of counsel.

Q. On the grounds heretofore mentioned?

A. That is correct.

Q. One other question, Mr. Brandhove. Does the Army Transport Service in San Francisco have a record of your activities?

A. I refuse to answer on the advice of counsel.

Chairman Tenney. Very well; that is all."

Prior to the latter questions the Committee's attention was called to the fact that the appellant had made an affidavit on December 9, 1946, which appeared in the Committee's 1947 report, in which affidavit the appellant "admits being a former member of the Communist Party and specifically that he was induced to become a member of the Communist

Party by Frank McCormick and Hugh Brysen in San Francisco; that after joining the Communist Party he carried out communist activities and so forth."

Other matters are contained in the record made a part of appellant's complaint. The exact or the substance of all questions asked of appellant are above set forth for the benefit of the Court.

The Committee proceeded with its meeting, and other matters relating to the prior activities of Brandhove, the statements made on oath by him to the Committee, and affidavits made on oath by him to the Committee were referred to. Elmer E. Robinson, appellee, made a statement and also gave testimony before the Committee. All of these matters appear on pages 45 to 74 of the transcript.

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## ARGUMENT.

### PART ONE.

### APPELLANT'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR DAMAGES UNDER THE CIVIL RIGHTS ACT.

The statutes involved are set out on pages 2 and 3 of the opening brief for appellant. Of necessity the facts upon which appellant relies must state a cause of action under the statutes quoted. Testing the complaint as filed or stripping from it all surplusage and legal conclusions, it fails to disclose:

(a) That the appellees, under color of any statute, ordinance, regulation, custom or usage of any state,

subjected or caused to be subjected the appellant to the deprivation of any right, privilege or immunity secured by the Constitution and laws. (Title 8 U.S.C., Section 43).

(b) That appellees conspired for the purpose of depriving, either directly or indirectly, appellant of the equal protection of the laws or of equal privileges and immunities under the laws or for the purpose of preventing or hindering constituted authorities of California from giving or securing to appellant within such State the equal protection of the laws.

(c) That appellees or any of them did or caused to be done any act in furtherance of any conspiracy whereby appellant was injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States (Title 8 U.S.C. 47(3)).

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## I.

### SUMMARY OF COMPLAINT.

Taking plaintiff's lengthy complaint by the four corners and reducing its substance to an understandable form, we find that Brandhove, a citizen of the United States, had testified before the Committee and had also furnished said Committee with affidavits prior to the time that he circulated in the halls of the State Capitol his so-called protest against a renewed appropriation of funds for the Committee. Contained in the protest were allegations impugning the integrity of the Committee and smearing Elmer E.

Robinson, who was then and is now the Mayor of San Francisco. The protest was being circulated while the Legislature of the State of California was in session, January 28, 1949.

The Court can take judicial notice that the Constitution of the State of California, Article 4, Section 2, provides, among other things, that

> "All general sessions shall commence at 12 o'clock m., on the first Monday after the first day of January and shall continue for a period not exceeding 30 days thereafter; whereupon a recess of both Houses must be taken for not less than 30 days."

The following concurrent resolution was adopted:

SENATE CONCURRENT RESOLUTION No. 26

CHAPTER 76

*Senate Concurrent Resolution No. 26—Relative to adjournment of the Legislature for the constitutional recess, and to the reassembling of the Legislature after said recess, and fixing the date for said adjournment and said reassembling.*

[Filed with Secretary of State February 3, 1949.]

WHEREAS, Section 2 of Article IV of the Constitution of this State requires that, after the Legislature has been in session for a period of not exceeding thirty days a recess must be taken by both houses for a period of not less than thirty days, therefore, be it

*Resolved by the Senate of the State of California, the Assembly thereof concurring,* That the

> 1949 Regular Session of the Legislature of the State of California shall adjourn for said recess at 3 o'clock p.m. on the twenty-ninth day of January, 1949, and shall reassemble at 12 o'clock m. on March 7, 1949.

The Court may take judicial notice of above! *Springfield v. Carter,* 175 F. (2d) 914 at 917; *Picking v. Penn. Ry. Co.,* 151 F. (2d) 240.

On January 28, 1949, a subpoena was issued and served on appellant (T.R. p. 22.), requiring him to appear before the Committee at a place therein specified, at 3:00 P.M. on Saturday, the 29th of January, 1949. Appellant appeared at the time and place fixed and was sworn as a witness and testified concerning his name, address and occupation. He was thereupon asked,

"Where did you reside in 1946, in December?"

Appellant refused to answer this and the other questions which are set out in the statement of the case, supra. The grounds for appellant's refusal were stated by his counsel and were partially repeated by the appellant. Upon refusal of appellant to answer the last question propounded to him, the hearing was concluded as to appellant (T.R. p. 45).

The Committee resolved to refer the matter of appellant's conduct to the Court and there was filed a complaint in the proper Court, charging appellant with the misdemeanor of violating Section 9412 of the Government Code of California. This section provides in part:

> "Every person who, being summoned to attend as witness before the Senate, Assembly, or any committee, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before the Senate, Assembly or any committee, wilfully refuses to be sworn, to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control is guilty of a misdemeanor."

The complaint was filed on January 31, 1949, in the Municipal Court of the City of Sacramento. Upon the complaint, plaintiff was arrested and imprisoned on the 1st day of February to the 15th day of February, 1949. He was prosecuted by the officer empowered so to do (the District Attorney) in a Court having jurisdiction; he was tried before a jury, which jury disagreed as to his guilt. The cause was continued to March 9, 1949, on which date, on motion of the prosecuting attorney, the charge was dismissed and the plaintiff discharged.

On March 21, 1949, the present complaint was filed. The complaint fails to show any further contact between the appellees and the appellant subsequent to January 29, 1949; nor does the complaint disclose that at any time subsequent to March 7, 1949, the date of the resumption of the session of the Legislature, any effort was made by appellant to continue to circulate his protest.

It appears further that on January 28, 1949, two of the appellees sent a telegram to the District At-

torneys of the City and County of San Francisco and the County of Alameda, signed by them as chairman and vice-chairman of the Committee, urging each of said District Attorneys to charge Brandhove with perjury or have the entire matter presented to the respective grand juries of each county.

There are further allegations in the complaint concerning the reading into the record of a claimed false criminal record of plaintiff and a newspaper article wherein an affidavit of plaintiff was called a tissue of lies and permitting in the record the statement of the chief counsel of the Committee to its chairman that "Mr. Brandhove was a liar"; also, allegations relating to an examination of appellant's counsel at the hearing before the Committee.

Withholding for future treatment in this brief the position taken by appellant on the appeal, it is apparent that:

## II.

### FACTS ALLEGED DO NOT SHOW DEPRIVATION OF CIVIL RIGHTS.

When ordinary and existing rules for the construction of pleadings are applied, plaintiff fails completely to allege any fact or circumstance showing deprivation of any right, privilege or immunity under the Constitution of the United States, including the XIV Amendment.

**A. Due process of law.**

No fact is alleged indicating in the slightest degree the deprivation of due process of law. In reading the

complaint, it appears that some claim is made that a right of the defendant was invaded by reason of having been served with a subpoena, which is made a part of the complaint.

In connection with the issuance of subpoenas by committees of the Senate or Assembly, the form thereof is prescribed by Section 9402 of the Government Code of California, which reads as follows:

> "A subpoena is sufficient if it:
>
> (a) States whether the proceeding is before the Senate, Assembly, or a committee.
>
> (b) Is addressed to the witness.
>
> (c) Requires the attendance of the witness at a time and place certain.
>
> (d) Is signed by the President of the Senate, Speaker of the Assembly, or chairman of the committee before whom attendance of the witness is desired."

Every requirement of this section is complied with.

It must be borne in mind that the Legislature is and has been held to be "* * * the grand inquest of the Commonwealth." *Ex parte McCarthy,* 29 Cal. 395, 402. A witness subpoenaed before a legislative committee is analogous to a witness subpoenaed before a grand jury. Applying the analogy, we find plaintiff's claim has consistently been decided adversely to his contention. See *In re Black,* 47 F. (2d) 543; also, *Blair v. United States,* 250 U.S. 273 (Plaintiff cited no authorities in support of his position).

**B. Freedom of speech.**

The complaint is completely silent on any facts or circumstances which in the slightest degree indicated that he was deprived of freedom of speech. As a matter of fact, when he had the opportunity to speak, he spoke the things he wanted to say, then remained silent and refused to answer any questions.

**C. The privilege of petitioning the Legislature for the redress of grievances.**

Although a claim is made in this respect by appellant and appears to be the main point relied upon, there are neither facts nor circumstances alleged in the complaint which indicate in the slightest degree the deprivation of this right by the act of any defendant in the case at bar or by anyone else. The service of a subpoena upon him could not have this effect; the short time that he spent in the hearing before the Committee could not have this effect; his remaining in jail and trial during the recess of the Legislature could not have this effect. Nothing was done to prevent any activity when the Legislature resumed its session on March 7, 1949, until the filing of the complaint.

**D. The requirement to plead specific facts as distinguished from conclusions of law is essential in cases of this type.**

See opinion of Judge Wilbur in *Williams v. Miller,* 48 F. Supp. 277. In denying certiorari in this case, the Supreme Court of the United States held in accordance with the opinion of Judge Wilbur. See 317 U.S. 599.

## III.

### THE RESOLUTION CREATING THE COMMITTEE IS CONSTITUTIONAL.

One of the bases of plaintiff's complaint is the claim that the resolution creating the Tenney Committee, if read into any criminal statute, is in violation of the 14th Amendment to the Constitution of the United States for want of certainty. See Paragraph 11 of plaintiff's complaint. This same attack has frequently been made upon the act of Congress creating the United States House of Representatives Committee on Un-American Activities. In the case of *Dennis v. United States,* 171 F. (2d) 986 (affirmed by the Supreme Court after certiorari granted on single issue of challenge of government employees called to serve as jurors), the Court disposes of this point as follows:

> "Since one of the chief points raised by appellant is a general attack on the constitutionality of the creation of the Committee and of the resolutions, rules and statute authorizing its activities, it may be said at the outset that it is the self-same Committee, operating under the same set of resolutions, rules and statute as has been recently passed on by at least two Courts of Appeals, and in two of the cases by the Supreme Court of the United States in denying petitions for certiorari. See Josephson v. United States, 2 Cir., 1947, 165 F. 2d 82, certiorari denied, 1948, 333 U. S. 838, 68 S. Ct. 609, rehearing denied, 1948, 333 U.S. 858, 68 S. Ct. 731; Barsky v. United States, 1948, ..... U. S. App. D.C. ....., 167 F. 2d 241, certiorari denied, 68 S. Ct. 1511, 334 U.S. 843; and Eisler v. United States, 1948, ..... U.S. App. D.C. ....., 170 F. 2d 273."

The cases cited above are to the effect that the constitutionality of the authority of the Committee should be upheld, that the creation of the Committee and the matters confided to it for investigation were constitutional and lawful.

However, the question has been set at rest by the recent decision of the Supreme Court in *Vern Smith v. The People of the State of California.* This was a petition for appeal to the Supreme Court of the United States in which the conviction of the appellant was sought to be reversed on the grounds that Senate Resolution No. 75 (the resolution appended to the complaint herein) was unconstitutional. The Supreme Court of the United States in passing upon this petition ruled as follows (69 S. Ct. 893):

> "Appeal from the Superior Court in and for the County of Alameda, State of California.
>
> April 25, 1949. Per Curiam: The appeal is dismissed for want of a substantial federal question."

Further, the Supreme Court of the State of California, upon an attack by this appellant, after his arrest as set forth herein, upon the constitutionality of the resolution creating the "Tenney Committee", ruled against plaintiff on this subject by denying his application for a writ of habeas corpus (See minutes of Supreme Court February 14, 1949, 33 A.C. 454).

## IV.

### MOTIVES OF THE COMMITTEE NOT SUBJECT TO JUDICIAL SCRUTINY.

Claims in the form of legal conclusions are made as to the intent of the Committee in subpoenaing appellant and holding the hearing. They appear to be (a) to suppress anyone criticizing the Committee and (b) to prevent plaintiff from petitioning the Legislature.

**A. These claims cannot be sustained factually.**

In respect to (a) above, no fact is alleged in the complaint from which this inference could be drawn. On the contrary plaintiff alleges that the Committee was under attack by certain members of the State Assembly. See Exhibit "F", top of page 5. The Court can take judicial notice of the fact that all such committees have been under constant attack and abuse by communists and communist inspired outlets. Such committees have likewise been criticized by others unconnected with the communistic movement.

In respect to (b) above, it is already covered in Subdivision C of II above.

**B. These claims likewise cannot be sustained under the law.**

In the case of *Dennis v. United States,* supra, the Court said:

> "* * * it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of

> the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution."

The decision in *United States v. Josephson,* 165 F. (2d) 82, touches upon this subject and is well worth considering by the Court.

In *Eisler v. United States,* 170 F. (2d) 273, at page 278, the Court said:

> "* * * During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appellant was 'to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress' powers.' The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees. * * *"

Although there may be no presumption as to the constitutionality of legislation enacted when civil rights are concerned, the fact still remains that the law is that there is a presumption that the action of the legislative body is legitimate. See cases heretofore cited and *McGrain v. Daugherty,* 273 U.S. 135.

Two things emerge with crystal clearness from plaintiff's complaint: First, that plaintiff was not interfered with in pursuing any right to petition the Legislature; second, everything that happened to plaintiff subsequently was occasioned by his contemptuous refusal to answer questions propounded by

a legally created Committee of the State Senate of the State of California. Contempt for the lawmaking body of the State of California was in the mind of appellant as evidenced by his protest. Contempt for the State Senate was on his lips when he appeared before the Committee.

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## PART TWO.

We recognize the Courts give meticulous care to cases involving claimed violation of the civil rights of a citizen, else we would close our brief here. We will go further and discuss

## I.

### THE LEGAL ARGUMENTS OF APPELLANT.

Appellees, other than Elmer E. Robinson, will hereinafter at times be referred to as the "Committee".

The appellant asserts (appellant's brief, p. 10) that he alleged in his complaint that appellees did certain acts:

1. Sent State telegrams to various (two) district attorneys urging them to prosecute appellant for perjury for circulating a petition;

2. Held an unfair and partial hearing of the Tenney Committee;

3. Compelled appellant's attendance at the hearing without prior disclosure of the purpose thereof;

4. Propounded thereat questions to him and his counsel which were not pertinent to any legislative purpose;

5. Resolved that a criminal complaint be filed in the proper Court at Sacramento, California because of appellant's refusal to answer questions at the hearing;

6. Threatened appellant's counsel with expulsion from the hearing room;

7. Read into the record at said hearing a claimed false criminal record of appellant and a newspaper article calling an affidavit of appellant "a tissue of lies" and an alleged telephonic statement by the Chief Counsel of the Tenney Committee that appellant was "a liar";

8. Caused appellant's arrest and imprisonment and compelled him to stand trial on a criminal contempt charge.

Appellant further asserts (appellant's brief, p. 11) that he alleged in his complaint that in doing these acts the appellees did them under color of state law and intended to and did deprive appellees of these constitutional rights:

1. The right of free speech;

2. The right to petition the Legislature for a redress of his grievances;

3. The right to a fair and impartial hearing in matters concerning his personal life, opportunity to earn a living and his honor (Due Process of Law);

4. The equal protection of the laws.

Appellant's complaint fails to allege which of the asserted acts resulted in the deprivation of which of

the rights, nor does appellant in his brief by argument or otherwise indicate which acts of the appellees deprived the appellant of which of his rights. This does not make our reply difficult, but it does enlarge it.

It would appear that of the eight acts or group of acts of which appellant complains, two of them, the eighth and the first, were not done under color of state law or power and that the other six did not result in the deprivation of any right guaranteed to appellant by the Constitution or laws of the United States.

**A. Only those acts occurring at the hearing were done under color of law.**

**(1) Causing appellant's arrest and imprisonment and compelling him to stand trial on a criminal contempt charge was not under color of state law.**

In this respect appellant alleged in his complaint that the Committee resolved that a criminal complaint be filed in the proper court in Sacramento and that such a complaint charging appellant with violating Section 9412 of the Government Code of the State of California was signed and sworn to by Appellee Tenney (T.R. 8).

The State of California conferred upon the Committee the authority to conduct a hearing, subpoena the appellant as a witness and question him when he appeared as a witness.

The Committee had the "authority" (if it be authority) to invoke (not to impose) certain sanctions when appellant appeared before the Committee and refused to testify.

If the legislature were in session, it could report to the Senate and if the Senate chose to entertain a motion, the Senate might call the plaintiff before the bar of the Senate in the nature of an order to show cause why he should not testify *(In re Battelle,* 207 Cal. 227; California Government Code, Section 9407.)

The legislature not being in session (see p. 12, supra), the Committee could make application to the Superior Court of Sacramento County and the Court would determine whether or not appellant should answer the questions (California Government Code, Section 9408), or a member of the Committee or anyone present could sign a complaint charging a misdemeanor in a Court of competent jurisdiction (California Government Code, Section 9412). The latter is the course that was followed.

Note that under Section 9407 the "authority" is given to the *Committee only,* to report the contempt to the Senate or Assembly, and that under Section 9408 the authority to petition the Superior Court is again conferred *on the Committee.*

However, Section 9412 is a criminal statute which merely specifies that certain conduct is a *misdemeanor;* it vests no authority in the Committee. The filing of a complaint charging the misdemeanor and the issuance of a warrant and all proceedings followed the usual course of misdemeanor actions in California.

On filing the complaint, the Court having jurisdiction and the district attorney having the power and duty to prosecute took complete charge of the matter

from then on. No claim is made by appellant that he did not receive a fair trial, nor does appellant claim that the Judge or District Attorney are parties to the so-called conspiracy.

To make out a cause of action under the Civil Rights Statutes, state *court* proceedings must have been a complete nullity with a *purpose* to deprive a person of his property without due process of law.

*Bottone v. Lindsley* (1948), 170 F. (2d) 705.

*United States v. Classic,* 313 U.S. 299, cited by plaintiff on the point, defines "color of law" as follows:

> "Misuse of power, possessed by virtue of state law *and made possible only because the wrongdoer is clothed with the authority of state law,* is action taken 'under color of law' * * *."

Under this definition, had the Committee proceeded under either Section 9407 or 9408, the action would have been "under color of law" since it could be taken only because those taking it were members of the Committee clothed with that authority.

However, as noted above, Section 9412 merely makes specified conduct a misdemeanor.

The preliminary complaint in a criminal proceeding is merely an allegation in writing, signed by a person who knows the facts charging that another has committed a designated offense *(People v. Tibbits,* 71 Cal. App. 709, 711). The allegation may be made by any citizen, and indeed it would appear that any citizen who has knowledge of such facts should, as an obli-

gation of his citizenship, report them to the proper authorities. The allegations made in such a complaint are not made by virtue of *authority of the state* with which the complaining witness is clothed. The swearing to such a complaint is not action taken "under color of state law" as that phrase is defined in the *Classic* case.

**(2) Sending state telegrams to various (two) district attorneys urging them to prosecute appellant for perjury for circulating the petition was not done under color of state law.**

In this respect, appellant alleged in his complaint that appellees Tenney and Burns on behalf of the committee sent telegrams to the District Attorneys of San Francisco and Alameda Counties demanding that they charge appellant with perjury or take the matter before the Grand Jury (T.R. 6). The telegrams themselves *urged* rather than *demanded* such action (T.R. 23-25).

The reasoning applied to signing a complaint charging a misdemeanor has application to sending the telegrams. To call circumstances indicating that a crime has been committed to the attention of the proper authorities is the duty of a citizen and does not flow from any *authority* or *color of authority* under State law. It will be observed that the complaint makes no allegation that the charge was unfounded—nor could it, having in mind that the complaint is verified by appellant.

**B. The appellant was not deprived of any rights guaranteed by the Constitution or laws of the United States.**

**(1) The appellant was not deprived of due process.**

**(a) The hearing was fair and impartial.**

Appellant does not indicate in what manner the hearing was unfair and partial except insofar as it may be assumed that the other asserted actions with respect to the conduct of the hearing would necessarily result in an unfair and partial hearing as a matter of law. Each will be considered in turn.

The record of the hearing made part of the complaint (T.R. 28-75) demonstrates factually the complete fairness and impartiality of the hearing. The questions asked appellant were all within the scope of and relative to the Committee's purposes.

**(b) Compelling appellant's attendance at the hearing without prior disclosure of the purpose thereof was not a deprivation of any constitutional right of appellant.**

In this respect, the appellant alleged in his complaint that the subpoena served upon him ordered him to appear as a witness before the Senate Committee on Un-American Activities (T.R. 5, 22).

The appellant does not question the authority of the Committee to subpoena him, but insists that failure to notify him of the specific purpose of the hearing deprived him of his rights. The Senate resolution authorizing the Committee bestowed upon it the power to subpoena witnesses and there was no requirement, either in the resolution or other law of the State of California relating to investigating committees of the

Legislature, requiring that a witness when subpoenaed be notified of the specific purpose of the hearing or of his testimony.

It would appear from appellant's authorities that in this connection appellant's real objection was not that he was subpoenaed without disclosing the purpose of the hearing, but that he was interrogated at the hearing without being informed of the purpose of the inquiry.

A legislative committee hearing is not an adversary proceeding; the only thing it can affect is the proposal, passage or defeat of legislation. Even plaintiff's complaint (paragraph 7; T.R. pp. 6, 7) alleges that the *ultimate* purpose was to secure legislative action on an appropriation.

In conducting such hearings the Legislature is not to be restricted by the fact that methods and processes generally employed in judicial or quasi-judicial proceedings are used. *(In re Battelle,* 207 Cal. 227, 244; *McGrain v. Daugherty,* 273 U.S. 135).

Certainly plaintiff, in his capacity as a citizen of the United States, has no right to have a State legislative inquiry follow certain forms. That is not a "privilege or immunity" of federal citizenship. Nor from the facts pleaded did the *hearing* deprive plaintiff of life, liberty or property. Finally, there is no allegation of fact to show that other hearings were conducted in another manner or that other contumacious witnesses received better treatment.

Appellant cites *Jones v. Securities and Exchange Commission,* 298 U.S. 1, 26, with some assurance on this point.

We could here enter upon a discussion pointing out the intricacies of the facts in the *Jones* case and the distinction between judicial hearings, administrative hearings and inquisitorial hearings of State Legislatures or other inquisitorial bodies (see *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186; *U.S. v. Morton Salt Co.,* 70 S. Ct. 357, at 362), but to what purpose, for wherein does the principle laid down in the *Jones* case have application to the case at bar? The appellant was properly subpoenaed and was properly before the Committee. He refused to answer questions before they were asked. He was specifically asked this question:

> "Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?
>
> A. I refuse to answer any and all questions on advice of counsel."
>
> (T.R. p. 38.)

Up to this point, where was any constitutional right or privilege or immunity of the appellant violated?

Thereupon, under an existing statute, which had general application, the machinery was set in motion by which the appellant was brought to the bar to answer a charge of whether he was guilty of a misdemeanor in respect to his conduct. No constitutional right, privilege or immunity of the appellant was vio-

lated in connection with these proceedings. The Supreme Court of the State of California refused to release him on his application for a writ of habeas corpus. Every right, privilege, immunity and guarantee to a citizen was accorded the appellant from the beginning of the controversy to the end thereof. His legal position, whether good or bad, asserted at the hearing before the Committee was available to him when the complaint charging the misdemeanor was filed. A jury disagreed as to his guilt, and a prosecuting officer ultimately dismissed the case. All the Committee did was to invoke the constituted judicial processes of the State of California to determine the propriety of the action of appellant in refusing to answer the questions. Carrying appellant's position to the conclusion which he desires to be reached would result in an absurdity. To illustrate: In any State case, criminal or civil, or any hearing legislative or otherwise, where a citizen is asked questions which he deems improper, there arises a cause of action under the Civil Rights Statutes. That is not the law.

**(c) The questions pertained to proper legislative purposes.**

A legislative committee can, with complete propriety, inquire into any subject matter which arises impugning its own integrity. (*Ex parte McCarthy,* 29 Cal. 395. See also the citation from *Eisler v. U.S.,* supra, page 21 of this brief.)

Each question related to communist activities of the appellant and his association with certain people, some of whom were known communists.

It is obvious from the complaint that a committee acting within the scope of its powers (see Resolution No. 75) and investigating communist activities, which activities the Court may take judicial notice are un-American, having received from a witness affidavits on the subject of communism and having received testimony from the witness on the subject of communism in which the witness declares that he, the witness, was a former communist, upon reading his so-called petition or protest, was clearly entitled to interrogate the witness again to determine the reliability of the facts which he had theretofore given before any recommendations based upon them be made in the course of the conduct of the Committee.

**(d) Resolution relating to charging appellant with a misdemeanor.**

The actual resolution passed was that the counsel for the Committee be instructed to prepare the necessary complaint and follow the necessary procedure to bring the witness before the Courts in Sacramento for contempt of the Committee (T.R. 42). This was an orderly and proper step to be taken and was the natural result of a situation brought about by appellant in refusing to answer questions.

**(e) The threatened expulsion of appellant's counsel from the hearing room was not improper.**

The appellant had no right to be represented by counsel for the right of a witness at a legislative inquiry is a matter of grace, not of right.

*Ex parte McCarthy*, 29 Cal. 395, 402.

The conduct of appellant's counsel in disregarding the instructions of the appellee Tenney, Chairman of the Committee, tended to disrupt and interfere with the orderly conduct of the hearing.

**(f) Matters read into the record.**

These matters are referred to in plaintiff's complaint, but just how either a correct or an erroneous reception into evidence at a hearing before a committee which had neither the power to try the appellant nor deprive him of any privilege or property could give him a cause of action under the Civil Rights Statute is not pointed out in his brief, and we close our comment on this subject.

**(2) The appellant was not deprived of the right of free speech.**

The complaint is completely silent on any facts or circumstances which in the slightest degree indicated that he was deprived of freedom of speech. As a matter of fact, when he had the opportunity to speak, he spoke the things he wanted to say then remained silent and refused to answer any questions. (See *U. S. v. Josephson,* supra).

This subject is covered in subdivision B of Paragraph II of Part One of the brief.

It is proper to add this further thought: It is extremely doubtful whether interference with a right to petition the Legislature constitutes a violation of the Civil Rights Statute. This subject, we are informed, is being discussed in the brief of His Honor, Elmer E. Robinson. Our comment is that under the

cases of *U. S. v. Cruikshank,* 92 U.S. 542, and *Snowden v. Hughes,* 321 U.S. 1, any such conduct is a matter of exclusive state concern.

**(3) The appellant was not denied the equal protection of the law.**

This is a point made by appellant, but he nowhere in his brief indicated how it arises or how or in any manner he was denied the equal protection of the law. (See *Mitchell v. Greenough,* 100 F. (2d) 184, at 187.)

The unlawful administration by state officers of a State statute fair on its face resulting in its unequal application to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. A discriminatory purpose is not presumed and the lack of any allegations in the complaint tending to show a purposeful discrimination is not supplied by the words "willful" and "malicious".

*Snowden v. Hughes,* supra.

There are no allegations that the Committee's action or conduct toward the appellant was any different from its action or conduct toward any other witness before it.

Paragraph 13 of the complaint fails to allege that the appellant was intentionally deprived of a political right, that is the right to petition the State Legislature. It recites that the acts of appellees were done "with malice and intent to intimidate and silence plaintiff, and deter and prevent him from effectively exer-

cising his constitutional rights of free speech and to petition the Legislature for redress of grievances". The allegation speaks only of an intent to abridge the privilege of free speech and to exercise the political right of petitioning the State Legislature. There is alleged no element of "intentional or purposeful discrimination between persons or classes".

Although these averments are immediately followed by the words "and also to deprive him of the equal protection of the laws", these words amount to nothing more than the pleader's legal conclusion.

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## II.

### THE RESOLUTION OF THE CALIFORNIA STATE SENATE CREATING THE APPELLEES' COMMITTEE KNOWN AS THE SENATE FACT FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES IS CONSTITUTIONAL.

In appellant's complaint he alleged that he had committed no offense by his conduct before the Committee because the resolution creating it, if read into any criminal statute, is in violation of the 14th Amendment of the Constitution of the United States for want of certainty. (T.R. p. 9)

Appellant's purpose in urging the unconstitutionality of the resolution in this brief is not clear because he argues (Appellant's brief, p. 17) that inasmuch as the Committee acted under the resolution it acted under color of state law irrespective of the constitutionality of the resolution. Nevertheless the

argument is met. The same attack has frequently been made upon the act of Congress creating the United States House of Representatives Committee on Un-American Activities. (See authorities under Part 1, Subdivision III of this brief).

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## CONCLUSION.

It is submitted:

(a) That the complaint does not state a cause of action, and

(b) That the judgment of the Court below be affirmed.

Dated, San Francisco, California,
April 19, 1950.

Respectfully submitted,

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